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In The
Supreme Court of the United States

No. 10,353

UNITED STATES OF AMERICA,
Appellee,

versus

EDWARD M. OSTENDORFF,
Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Ernest J. Howard
P. O. Box 10322
Greenville, S. C. 29603

P. Bradley Morrah, Jr.
Stokes Building
Greenville, S. C. 29603

Attorneys for Petitioner

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Edward M. Ostendorf, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on January 9, 1967.

OPINIONS BELOW

There was no formal opinion of the District Court. The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1967. This Court's jurisdiction is invoked under 28 U. S. Code Sec. 1254(1), 28 U. S. Code Sec. 1651 and 28 U. S. Code Sec. 2106.

QUESTIONS PRESENTED

I

Whether a Trial Judge may question witnesses and make remarks prejudicial to the defendant without giving a cautionary charge to the jury.

II

Whether the Appellate Court (Circuit Court) may refuse to invoke Rule 52 (b) if the Trial Judge has committed plain error, it being alleged by the petitioner that said error affected his substantive rights, and, indeed, related to the sole issue in the case.

III

Whether the charge to the jury, "It is also of some significance that the degree of proof required to show willful failure to file a return, the misdemeanor here, is not so demanding as if this were a prosecution for willful tax evasion, a felony," which charge was found to be error by the Appellate Court, was sufficient to warrant a new trial.

IV

Whether there was sufficient evidence to convict the defendant under 26 U. S. Code 7203.

Statute Involved

7203. ***Willful failure to file return, supply information, or pay tax***

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made un-

der authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Rules Involved

Rule 52

HARMLESS ERROR AND PLAIN ERROR

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 30

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

STATEMENT

The petitioner was tried in the United States District Court for the Eastern District of South Carolina, Columbia Division, upon a three count information charging violations of Section 7203, Title 26, United States Code (Internal Revenue Code, 1954), in that the petitioner willfully failed to file income tax returns for the years 1959, 1960 and 1961. The trial was held before a jury which returned a verdict of guilty. The sentence of the Court on count one committed the petitioner to the custody of the Attorney General for a period of one year suspended upon the service of six (6) months with three years probation. As to count two he received a sentence of one year and $2,500.00 fine, suspended upon the payment of the fine with three years probation. As to count three, one year probation to run concurrently.

The petitioner, a resident of Greenville, South Carolina, and the father of eight children, admitted that for the years 1959, 1960, and 1961 he did not file income tax returns as required but denied that there was any bad motive or willfulness on his part, it being his contention that the pressure of business and his overzealous desire to properly handle the funds of others entrusted to him had left him so engrossed as to be without adequate time to take care of his personal affairs. Although realizing that the law imposed upon him the obligation and duty to file his tax returns he was of the honest opinion that the failure would merely result in his having to pay civil penalties and interest on any tax due. Initially his tax return for the year 1959 was not timely filed since his 1958 return was being audited by the Internal Revenue Service which had his records and did not return them to him until well after the filing date. That he was a person required to file is admitted. That he was willful in his failure to file is denied.

When the Internal Revenue Agent Huggins first visited Mr. Ostendorff's office to inquire about his 1961 tax returns he (Huggins) had no information relating to his 1959 or 1960 returns. Mr. Ostendorff voluntarily disclosed at this time that he had not filed for any of the three years but that he was working

on them. In fact the records were in his office where he was preparing them and consisted of a sufficient number of papers to fill three boxes. That he was working on the returns was verified by employees who observed him. As Mr. Ostendorff related in his testimony he was working on his returns in the presence of employees and had told them that he was working on his returns and had to get them in.

That he was an extremely busy man cannot be seriously denied. During the period under consideration he moved to another city, was involved with several corporations, corporate mergers, stock sales, corporate re-organizations, meetings too numerous to mention in widely scattered places, staffing sales force and personnel training and ther allied and related duties. He became so obsessed with his work and the trust placed in him in the various business ventures that he became completely distracted and detached from his own personal responsibilities. His business interests were so intense that he even had to seek psychiatric assistance to bring him back into proper perspective.

The agents, during the investigative procedures, found him to be cooperative, willing to furnish any and all material, papers, and records requested. He even asked for their assistance in the preparation of his returns. Even though the gross income at first impression appears to be rather substantial, his tax liability, if any, would be relatively small. His tax return for the year 1958 was audited and although a gross income of $114,000.00 was reported no tax was found to be due. None of the counts in the information for the three years under consideration was near the figure for the year audited.

The unostentatious personal living habits of the petitioner and his family disclose that his income was merely modest. He and his family lived in a home located in a residential area of homes priced in the 20 to 25 thousand dollar range with a substantial mortgage upon his home. Although he had seven children living at home his wife was without domestic help.

That the jury was obviously concerned about the degree necessary to convict is indicated by the length of time it deliberated and the lateness of the hour before returning its ver-

dict on a cold, wintry night. It initially began its deliberation at 4:59 P.M.; returned for additional instructions at 9:15 P.M.; and returned its verdict at 11:05 P.M.

REASONS FOR GRANTING THE WRIT

I

By stipulation it was agreed that the only issue in the case was the issue of willfulness. It was thus extremely important that the thin membrane of impartiality should remain intact throughout the trial. The Trial Judge by questioning one of the defense witnesses and by certain remarks and by his failure to give a cautionary charge to the jury pierced this thin membrane thereby depriving the petitioner of a fair and impartial trial. (The portions complained of are set out herein in Appendix B). The Circuit Court noted that a Trial Judge is "not a bump on a log," nor a "referee at a prize fight." His function properly encompasses a participation in the examination of witnesses if needed. However, his duty does not permit his assuming the role of an advocate, nor does it embrace a right to participate in a trial whereby his lightest word or intimation is received by the jury with deference, without him instructing that they are the sole judges of the facts and that they are to draw no inferences from his remarks or expressions. This important factor is completely lacking in this case. A careful search of the charge reveals that the Trial Judge nowhere gave such a cautionary charge to the jury. And it was indeed most important in this particular case since the only issue involved was that of willfulness and since it was such a close case. As was noted in the concurring opinion of Chief Judge Duffy in *United States v. Carmel*, 267 F. 2d 345, 350 (7 Cir. 1959) when remarks of the Trial Judge are considered separately there may be an absence of prejudicial error. "However, taken all together, I have been forced to the conclusion that in this close case the attitude of the learned Trial Judge must have had great influence with the jury, and the 'atmosphere of impartiality' was thus destroyed." See also *Starr v. United States*, 153 U. S. 614, 626, 14 S. Ct. 919 923, 38 L. Ed 841 and opinion

of Chief Justice Hughes in *Quercia v. United States*, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321. The Circuit Court in its decision respecting this particular point remained silent. It insisted that defense counsel labored under a misconception of the proper function of a Trial Judge. It is respectfully urged that one of the proper functions of a Trial Judge under the circumstances as exists here is to give cautionary instructions to a jury, and this Court as the highest legal authority in the land should delineate proper guidelines therefor. It is urged that a clarification is needed for the proper guidance of the Courts in future cases.

II

The Circuit Court refused to consider two assignments of error by petitioner by reason of the failure of counsel to abide by Rule 30, *Federal Rule of Criminal Procedure*. It chose to rest upon its reading of Rule 52 (b) as being permissive and not mandatory. It appears that Rule 52 (b) was adopted to insure that the rules themself do not operate to deprive a defendant of a substantive right. It insures that justice be done by law and not injustice by procedure. It is respectfully submitted that the Circuit Court by failing to consider the two assignments of error has taken the path of least resistance. It did not find that there was no plain error—it merely stated that it did not have to consider the questions raised—and so did not.

One of the assignments of error which it refused to consider was whether or not the Trial Judge had properly instructed the jury on the definition of willfulness. As was noted in the Circuit Court's decision the only element submitted to the jury was that of willfulness. If there was error in the instructions to the jury on this vital element should not the Circuit Court have reviewed it? Justice would dictate a review even if it had not been assigned as error. Those accused of crime are entitled to be tried under proper legal criteria regardless of the ability of counsel to recognize as erroneous a charge during the pressures of a trial. Certainly the petitioner should not suffer substantively for a procedural error.

Specifically the assignment of error concerned the giving of the following definition, among others, of the word willful:

> "This, of course, is a criminal proceeding, and the word willful as used in this statute means an act done with a bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely or with a bad motive."

The above instruction has been held to be erroneous by at least two Circuit Courts. (*Forster v. United States,* 237 F. 2d 617 (9 Cir. 1956); *United States. v. Palermo,* 259 F. 2d 872 (3 Cir. 1958). In the Forster case the Court stated at page 621:

> "In some income tax cases the instruction is harmless, such is the type of case where the main issue is *not* willfulness." (Emphasis added)

Syllogistically, the error assigned is indeed harmful. The Circuit Court should have therefore considered this assignment of error, otherwise the reason for the existence of Rule 52(b) is reduced to an absurdity.

The other assignment of error also related to the issue of willfulness, said error being that the instruction as given was incorrect because it was incomplete.

> "A finding of willfulness does not depend upon a showing that the defendant knew it was a crime to fail to file a return or upon a showing that he intended to defeat or evade the tax."

Whereas here, a specific evil motive is required to establish the offense charged the Court should have instructed the jury that the state of mind of the accused could be considered by the jury in determining whether or not he had the specific evil motive. See *Yarborough v. United States,* 230 F. 2d 56 (4 Cir. 1956) cert. den. 351 U. S. 969 where it was held that the inability of a taxpayer to pay his tax, although not a legal defense for a failure to file, is a factor which may be considered in determining whether the defendant's action was

willful. Although this charge itself was not necessary to the case, having been given, the petitioner was entitled to a complete and correct charge.

It is respectfully submitted that the Circuit Court should have considered both assignments of error under Rule 52(b) since both related to the one vital issue in the case.

Is is urged that this writ be granted so that the various Courts may know the proper definition of willfulness under the section involved and also so that a clarification can be made as to the duties and responsibilities of the Circuit Courts under Rule 52 (b).

III

The degree of proof required in criminal cases is that proof necessary to convince beyond a reasonable doubt. Any less degree of proof is insufficient and any charge which permits a lesser degree is erroneous. However, a charge by the Trial Judge objected to by defense counsel, permitted such a lesser degree of proof. The Court instructed:

> "It is also of some significance that the degree of proof required to show willful failure to file a return, the misdemeanor involved here is not so demanding as if this were a prosecution for willful tax evasion, a felony."

The Circuit Court recognized this as a "potentially misleading instruction," but believed the error not sufficient to require a new trial.

It is urged that degree of proof is one of the basic elements in every criminal trial and an error relating thereto cannot be less than serious. The Circuit Court felt that with the other instructions on burden of proof that the jury applied the proper rule of law. Thus it has fallen into the error criticized by this Court in *Bollenback v. United States*, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (1946) where it was pointed out:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." (Page 613)

Courts may not assume that juries are so possessed with legal knowledge that they can weed out erroneous instructions and apply only those portions containing correct law. It forces the appellate Courts to speculate as to what law the jury has actually applied in reaching its verdict. This is indeed foreign to our system of jurisprudence. To hold otherwise would theoretically permit juries to disregard the Court's instruction in its entirety and apply what they believe to be the law.

IV

Furthermore it is asserted that the Court committed error in failing to grant the petitioner's motions for judgments of acquittal, both at the end of the government's case in chief and at the close of the case. The full thrust of the government's case was directed at establishing what had been stipulated, that is, that the petitioner was required to file returns for the years in question, and that he had failed to do so. It failed to direct its case to the only remaining necessary element—willfulness. It relied upon its assertion that the element of willfulness could be inferred from the failure to file. An adherence to such a position is tantamount to shifting the burden of proof onto the shoulders of the petitioner to prove his innocence. The government must assume its burden of offering sufficient proof on each element constituting the offense to prove beyond a reasonable doubt the guilt of the accused. When it fails in the proof of one essential element it fails completely. Here it failed completely to offer any proof on the single issue of willfulness.

The Circuit Court held the evidence to be sufficient reciting that the defendant was a college graduate, had filed returns in previous years and had extensive business experience. This the Court garnered from an interview of the petitioner by an internal revenue agent. Neither singly nor together can the recited reasons support a finding of willfulness. If so, Congress should have omitted the word willful as an element for anyone who fell within the same class as this petitioner. It is respectfully submitted that Congress did not intend to make criminal the failure to timely file a return by a college graduate who had business experience and had previously

filed unless the failure on his part was willful. A review of the interview discloses that the failure to file by this petitioner was totally lacking in this vital element. The Trial Court therefore should have granted the motions for judgment of acquittal.

CONCLUSION

This Court should grant the petition for a writ of certrorari for the following reasons:

1. A Trial Judge who undertakes to question a witness to the detriment of a defendant and who makes remarks in the presence of the jury which are lacking in impartiality should give a cautionary charge to the jury in order to preserve the atmosphere of impartiality of the trial to which a defendant is entitled.

2. A Circuit Court should invoke Rule 52 (b) *Federal Rules of Criminal Procedure* in reviewing plain error in order to insure that substantial justice is done.

3. A defendant is entitled to a correct and unequivocal charge on the basic element relating to the degree of proof necessary for a conviction.

4. There must be sufficient evidence produced by the government to show a willful failure to file tax returns. The fact that a defendant is a college graduate, has filed returns in prior years, and has business experience cannot be equated to willfulness.

Respectfully submitted,

Ernest J. Howard
P. O. Box 10322
Greenville, S. C. 29603

P. Bradley Morrah, Jr.
Stokes Building
Greenville, S. C. 29603

Attorneys for Petitioner

APPENDIX

APPENDIX A

Before Sobeloff, Bell and Craven, Circuit Judges.

P. Bradley Morrah, Jr. (Ernest J. Howard on brief) for Appellant and Charles S. Porter, Assistant United States Attorney, (Terrell L. Glenn, United States Attorney, on brief) for Appellee.

Craven, Circuit Judge:

Admitting his failure to file income tax returns for the years 1959, 1960, and 1961, and his duty to file them, Edward M. Ostendorff insisted in the district court that he was nevertheless innocent of violations of 26 U.S.C.A. Section 7203 because his failure to file returns was not "willful." Convicted by a jury upon each of three counts, he now appeals to this court from the judgment of the district court requiring that he serve six months in the penitentiary and pay a fine of $2,500.00 and assigns numerous errors.

To sustain its burden of proof under Section 7203 of Title 26 of the United States Code, it was necessary that the government establish three elements constituting the offense described in the statute: (1) that the defendant was required by law to file a tax return for the year in question, (2) that he failed to timely file such tax return, and (3) that the failure was a willful failure. Because of defendant's stipulation, only the last element was submitted to the jury: whether the failure was willful.

The evidence offered by the government was ample to support the jury determination of willfulness. Ostendorff and his wife filed individual tax returns for three previous years: 1956, 1957, and 1958. He is a college graduate with some special knowledge of accounting and insurance. His business experience was extensive and his enterprises very largely successful, as indicated by gross incomes of $68,000.00 in 1959, $79,000.00 in 1960, and $74,000.00 in 1961. He testified that he "of course" knew that the law required him to file tax returns. His excuse for failure to do so was expressed by him in an interview with

an agent of the Internal Revenue Service: "At various times I would get back to the orderly preparing of the records and make up the return but would have to drop it to get back to the business of protecting the business of the investors who had put their trust in me." In other words, he was too busy to attend to his own business. The jury was not bound to accept his explanation if, indeed, it was sufficient. We think the jury could permissibly infer that Ostendorff willfully failed to do what the law requires to be done, *i.e.*, that he had the specific intent to disobey or disregard the requirement of the statute that he file tax returns. See *Haner v. United States*, 315 F.2d 792, 795 (5th Cir. 1963) [dissenting opinion].

Four assignments of error consist of attacks upon excerpts from the judge's charge to the jury. Two of them were not called to the attention of the trial judge and are asserted in this court for the first time. Rule 52(b) of the Federal Rules of Criminal Procedure permits, but does not require, this court to notice plain errors although they were not brought to the attention of the district court. But it was never intended that Rule 52(b) be applied in such a way as to destroy Rule 30, which provides that no party may assign as error any portion of the charge to the jury unless he objects thereto before the jury retires stating distinctly the matter to which he objects and the grounds of his objection. *E.g., United States v. Jones*, 340 F.2d 599 (4th Cir. 1965). We decline to consider the belated exceptions to the judge's charge.

In apt time, defendant objected to the following portion of the charge: "A series of defaults, indicating a pattern of behavior, knowingly and intentionally made, *may* suggest the existence of a specific evil motive." [Emphasis added.] Even out of context, we find no error. Such an instruction does not compel the jury to draw the inference. Compare *United States v. Palermo*, 259 F.2d 872 (3d Cir. 1958).

Also in apt time, defendant objected to the following portion of the charge: "It is also of some significance that the degree of proof required to show willful failure to file a return, the misdemeanor involved here, is not so demanding as if this were prosecution for willful tax evasion, a felony." The po-

tentially misleading instruction was apparently derived from *Spies v. United States*, 317 U.S. 492 (1943), wherein the Court was not speaking of burden of proof but of greater and lesser offenses. If the defendant felt that the jury might have been confused by this isolated excerpt from the entire charge, his counsel should have done more than object and should have stated the grounds for his objection as required by Rule 30. Considering the matter in context with the additional very comprehensive instructions on burden of proof, we think the error was not so serious as to require a new trial.

Although not objecting to another portion of the charge admittedly more favorable to the defendant than he was entitled to have,[1] the defendant now insists that the erroneous instruction became the law of the case and if disregarded by the jury its verdict should be set aside. This contention is without merit. It is sufficient to note that we are unable to determine that the erroneously favorable instruction *was* disregarded by the jury.

Another assignment of error relates to the court's sustaining the government's objection to a question posed to a witness as to what was said by the defendant with reference to his income tax. The court sustained the objection to this question on the ground that the answer would be a "self-serving" declaration. A rigid adherence to exclusionary rules of evidence, especially one with so questionable a pedigree as the rule forbidding "self-serving" statements is always a hazard to affirmance on appeal and is usually undesirable. See *United States v. Stoehr*, 196 F.2d 276 (3rd Cir. 1952); *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944); 6 Wigmore, Evidence § 1732 (3d ed. 1940). Indeed, "the modern rule [is] to admit in evidence any matter which throws light on the question in controversy, leaving to the discretion of the judge [the obligation] to hold the hearing within reasonable bounds . . ." *Banko v. Continental Motors Corp.*, F.2d (4th Cir. 1966)

[1]The district court charged:

"(T)hat if the United States of America relies upon circumstantial evidence, in addition to direct evidence or completely, that such circumstantial evidence must be such as to exclude every other reasonable hypothesis than the guilt of the accused."

[quoting from *United States v. 25.406 Acres of Land*, 172 F.2d 990, 995 (4th Cir.) *cert. denied*, 337 U.S. 931 (1949)].

But we need not reach the question of whether the exclusion was prejudicial for the reason that the witness later on answered virtually the same question on cross-examination. Nor do we know that the first question to which the objection was sustained would have elicited a more complete answer, for counsel made no proffer of the rejected testimony.

The most serious assignment of error is that the defendant was deprived of a fair and impartial trial by reason of the trial judge's prejudicial remarks. We have carefully examined the numerous parts of the records asserted to disclose the bias of the trial judge. We think counsel misconceives the proper function of a federal district judge. He is not a bump on a log, nor even a referee at a prizefight. He has not only the right, but he has the duty to participate in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by counsel. He is in charge of the trial and may exercise his control to assure that the jury is not mislead by unfair phrasing of questions by counsel. *E.g., Johnson v. United States*, 333 U.S. 46, 54 (1948) [Frankfurter, J., dissenting]; *United States v. Godel*, 361 F.2d 21 (4th Cir. 1966); *Simon v. United States*, 123 F.2d 80 (4th Cir.), *cert. denied*, 314 U.S. 694 (1941). "A trial judge, who is after all 'the only disinterested lawyer connected with the proceeding', has the duty to help make clear to the jury the facts and circumstances pertinent to the case. 'He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other'." *United States v. Godel, supra*, 361 F.2d at 24 [quoting from *Simon v. United States, supra*, 123 F.2d at 83]. This assignment of error is without merit.

Affirmed.

APPENDIX B

[Examination of James Truesdale]

"*Court*: I want to ask him a question or two, gentlemen. What company was it that you were with

that you were selling people on the idea of Estate Planning?

"A. Southeastern Consultants.

"Q. And you said you did not know anything about Estate Planning?

"*Witness*: No, sir, I did not.

"*Court*: Well, I wrote down that you said to the counsel that you did not know anything about Estate Planning. Was that your answer to counsel?

"*Witness*: As far as the detail no, sir, I didn't know anything.

"*Court*: And yet you were selling the public on the idea and not knowing anything about it? What were you representing to them? I just want to know as a matter of right and wrong.

"*Witness*: If I contacted you I would try to sell you on the idea that this company, Southeastern Consultants, had a group of men, not only Mr. Ostendorff, but a group of men, including the attorney which was here yesterday, that was really knew their business as far as the Estate Planning Service was concerned.

"*Court*: If you didn't know anything about Estate Planning how could you truthfully tell them that they knew their business about it?

"*Witness*: Well, frankly, I had a brochure, I went through the brochure.

"*Court*: You just took what somebody else else gave you?

"*Witness*: That's right.

"*Court*: And what did that brochure contain with reference to taxes?

"*Witness*: It emphasized the fact that Mr. Slotchiver, the attorney, was, is the estate tax expert.

"*Court*: What did it say about him being an estate tax expert?

"*Witness*: It gave mostly his education.

"*Court*: What did it say about taxes? You mentioned estate taxes, what did it say about income tax?

"*Witness*: Your Honor, I don't remember it said anything about income tax.

"*Court*: It's your conception then that you can plan an estate without considering income taxes?

"*Witness*: No, sir, I don't think you can.

"*Court*: I just wanted to know what you represented to the public when you were making this sales pitch.

"*Witness*: I tell you frankly, sir, I wasn't too informed and I didn't do a very good job.

"*Court*: Well, you were making $700.00 a month, right?

"*Witness*: A draw, yes.

"*Court*: Well, that's the same thing. If you are putting it in your pocket whether you make it or draw it, isn't that right?

"*Witness*: Of course, I was only there for a short time. Actually I was only involved with Southeastern Consultants as a contact man a short time.

"*Court*: I thought you said a year.

"*Witness*: Approximately a year, but, I mean, as far as actually making contacts I made very few as far as Southeastern Consultants was concerned.

"*Court*: Of the contacts you made how many people did you get to take the services, approximately?

"*Witness*: Well, I had some commitments for two or three that later we didn't get.

"*Court*: Why didn't you get them?

"*Witness*: Frankly, sir, I don't know. That was contact with Mr. Ostendorff and Mr. Slotchiver. Now, I had one that I definitely got.

"*Court*: Who would you go to mostly, widows?

"*Witness*: Oh, no, sir. Bob Jolly, the postmaster in Greenville, South Carolina was the one I am sure I got. I never contacted a widow, not the whole time I was there.

"*Court*: But you sold the Estate Planning without knowing anything about it?

"*Witness*: Actually I didn't sell the Estate Planning, I was trying to sell the people on the idea of trying to get these people take it over.

"*Court*: All right, sir. Does counsel want to pursue?"

During the cross-examination of Robert Foster the following occurred:

"*Mr. Glenn*: Q. Your reaction to the attitude of Mr. Ostendorff—let me put it this way to you. If Mr. Truesdale's reaction to Mr. Ostendorff's attitude was

a matter of unconcern yours is different, is that correct?

"*Mr. Morrah*: Your Honor, I hate to object to this type of questioning on Mr. Truesdale but what possible concern is what the reaction to this man is to somebody else's reaction. He is not on trial. I know it's cross examination.

"*Court*: Well, it's cross examination and you parked him up there as your witness and saying he has been playing ring around the roses with him for months and knows all about him, that's the reason he can testify about him. And so the District Attorney says, 'Well, you know all about him, what was your reaction, friend to friend, man to man or employee to boss'. All right, Go ahead."

In the direct examination of the petitioner: (T. 312-313)

"*Mr. Glenn*: Your Honor, we don't agree that it had been marked for identification. He just wrote his name on there. He specifically said that he could not identify them as his records.

"*Court*: That's correct, Senator. He didn't identify them as the thing he had seen before. You just asked him to mark to identify that he saw something similar to that, isn't that right?

"*Mr. Morrah*: Yes, I—

"*Court*: —Isn't that right?

"*Mr. Morrah*: Yes, sir.

"*Court*: Let's just get it straight, let's don't mislead this Jury, that's one thing we don't do here. In other words, when I let you have him mark it you made the statement and he made the statement, as I recollect him: 'I can't say whether those are the same or not, I don't know about the contents but if you want me to I will put my name on it.' That's the identification, isn't that right?

"*Mr. Morrah*: That's correct.

"*Court*: All right, sir, I just wanted to have it understood.

"*Mr. Morrah*: I wanted to, with the liberty of the Court, to ask this witness if these are the records he gave him. I think I can introduce them that way.

"*Court*: Why, you can ask him that. That doesn't mean that Mr. Quattlebaum saw those records.

"*Mr. Morrah*: No, sir, I understand.

"*Court*: I don't want you to convey that because it would be false representation, under his testimony."

Also in the direct examination of the defendant: (T. 334)

"*Mr. Porter*: May it please the Court, the question is not to pay the taxes. We object to the question as being irrelevant.

"*Court*: That is correct. Because you don't want a trial for fraud.

"*Mr. Morrah*: I thought I said file any returns, Your Honor.

"*Court*: Well, he thought you said pay the tax. There is no allegation of fraud here.

"*Mr. Morrah*: That's right. I will withdraw that.

"*Court*: He didn't pay any tax, apparently, but he didn't file the return, that's what he's indicted on."

* * *

On redirect examination of the defendant: (T. 367)

"*Mr. Morrah*: What's your relation with these trustees?

"*Mr. Glenn*: If your Honor please, I don't see where this is redirect examination. He has gone into—

"*Court*: What about that, Senator?

"*Mr. Morrah*: Your Honor, he opened it up when he went into Estate Planning.

"*Court*: Well, he didn't open it up. You had a ham and a cake and a wide road when we let you use that for his guidance, didn't you?"

On cross-examination of Internal Revenue Agent Huggins:

* * *

"Q. All right, sir. But on your first visit this man said to you—sitting in my office and there are my tax records and I have been working on them, didn't he?

"A. Yes, sir.

"Q. Trying to get them so I can complete the returns and get them in, didn't he?

"A. Yes, sir.

"Q. And that's the truth of the matter, isn't it?

"A. Yes sir.

"*Mr. Glenn*: I'm not going to let him make that kind of statement.

"*Mr. Morrah*: I apologize if I transgressed on the Court.

"*Court*: He is just hot in his cause, as you say back home, and that's all right. He has got to make a little speech now and then, and he is a great Senator and I am with him even if I have to listen.

"Go on, make your speech.

"*Mr. Morrah*: I was going to suggest, by proper motion, we could dispense with that with that pleasure on your part.

"*Court*: Well, I thank you very much, sir, for your kind suggestion but I'm still the Judge."

• • •

"*By Mr. Morrah*: Let me ask you this. You looked over this man's returns. Didn't they withhold part of his salary on these corporate records return from which he drew revenue?

"A. More than likely they did. I cannot remember distinctly.

"Q. Well, it would be a corporate duty, where a salary is paid to an individual, it would be withheld, wouldn't it, under the regulations?

"*Court*: Yes, sir, everybody knows that.

"*Witness*: Yes, sir.

"*Court*: If they didn't withhold it they should have. They withhold mine."

• • •

"*Mr. Morrah*: And I believe that finally the department took the position they would have to forget the corporate return and put them both together, combine the individual and the corporate, didn't they?

"*Mr. Glenn*: Your Honor, I'm really reluctant because the government is not trying to hide anything, it's simply that we are getting so far afield from what this witness was put in reply.

"*Court*: He said, Senator, the water is getting too muddy."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1043

EDWARD M. OSTENDORFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An information was filed against petitioner charging him with wilful failure to file his federal income tax returns for the years 1959, 1960, and 1961, in violation of Section 7203 of the Internal Revenue Code of 1954 (A-295-296).[1] After a jury trial he was found guilty on all three counts, fined $2,500, and sentenced to six months in prison to be followed

[1] "A" references are to the Appendix for Appellant in the court of appeals.

by three years probation (A-327). The court of appeals affirmed (Pet. App. A). Further review is not warranted.

1. The evidence showed that petitioner had filed income tax returns for the years 1956, 1957 and 1958 (A-10), but had not filed for 1959, 1960 and 1961 (A-10-11). No extensions were ever granted for the filing of these returns, and at the time of the trial they still had not been filed (A-14, A-262). Petitioner's gross income was $68,915.16 in 1959, $79,993.45 in 1960 and $74,499.24 in 1961 (A-5), and his income tax liability was $2,645.26 for 1959, $9,044.56 for 1960 and $7,336.29 for 1961—a total of $19,026.47 (A-55). Petitioner had also failed to file State income tax returns with the South Carolina authorities for the years 1959, 1960, and 1961 (A-87). In February 1963, when agents of the Internal Revenue Service asked him whether he had filed returns for the years in question, he replied that he had not, and explained that he had not had time to get his records in such order that he could take them to someone to prepare the returns (A-20, A-23). The essence of the defense at trial was that petitioner had been extremely busy with his various life insurance and estate planning enterprises and had never had the time to get around to taking care of his tax returns. He admitted knowing that the returns should have been filed each year by April 15 (A-37). The evidence also showed that petitioner held the title of Chartered Life Underwriter (A-175), that he had attended college and business school, and that he had taken courses in commercial law and accounting (A-52, A-175).

2. a. Petitioner's argument that the evidence was insufficient to support the verdict (Pet. 10-11) is without substance. All the government was required to establish was that petitioner was a person required to file returns, that he had failed to do so, and that such failure was wilful. The first two elements were conceded at the trial. The jury could readily infer wilfulness from the evidence that petitioner had failed to file for three consecutive years; that such failure continued to the time of the trial and embraced not only federal but also State tax returns; that no satisfactory explanation for the failure was forthcoming although petitioner testified in his own behalf; that petitioner knew the returns were due on April 15 of each year; and that he had taken courses in commercial law and accounting and was a Chartered Life Underwriter specializing in estate planning.

b. Neither is there merit in the argument (Pet. 6-7) that the trial judge deprived petitioner of a fair trial by questioning witnesses and intruding too much in the trial. A federal judge, of course, has the right to aid in eliciting truth, so long as he does not become an advocate for either side. *Fritts* v. *United States*, 80 F. 2d 644 (C.A. 10); *United States* v. *Aaron*, 190 F. 2d 144 (C.A. 2), certiorari denied *sub nom. Freidus* v. *United States*, 342 U.S. 827; *Hellman* v. *United States*, 339 F. 2d 36, 37-38 (C.A. 5); *Simon* v. *United States*, 123 F. 2d 80 (C.A. 4); *Kowalsky* v. *United States*, 290 F. 2d 161, 163 (C.A. 5), certiorari denied, 368 U.S. 875. As the court of appeals found, the judge here did not cross

the line; the few instances complained of (Pet. 15-20) are selected from a 450-page trial transcript and, when read in proper context, are seen to be harmless. As for the judge's failure to give a "cautionary instruction" (Pet. 6-7) that the jury was the sole judge of the facts, we point out that no such instruction was ever requested.

c. Petitioner contends (Pet. 7-9) that the trial judge committed plain error when he gave the following instruction as part of the definition of wilfulness (A-303):

> This, of course, is a criminal proceeding, and the word willful as used in this statute means an act done with a bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely, or with a bad motive.

No objection to this instruction was made at the trial, as required by Rule 30 of the Federal Rules of Criminal Procedure. While in *Forster* v. *United States*, 237 F. 2d 617, the Ninth Circuit held that a somewhat similar instruction had been given such prominence in a supplemental charge that it constituted reversible error—when timely objection was made—the same circuit, in *Herzog* v. *United States*, 235 F. 2d 664, certiorari denied, 352 U.S. 844, emphasized that the instruction itself was not plain error and must be read in conjunction with the charge as a whole, rather than in isolation. Here the district court repeatedly charged that negligence—even gross negligence—was insufficient to convict; that wilful meant purposeful, deliberate and intentional, as dis-

tinguished from accidental, inadvertent or negligent; and that it meant an act done with a bad purpose or bad motive (A-301, A-302, A-303). Most pointedly, no reference to the instruction now complained of was made in the supplemental instruction on wilfulness given to the jury after it had asked for guidance during its deliberations (see A-308-309).[2]

d. There is no merit to the contention (Pet. 9-10) that the trial court committed reversible error in instructing the jury (A-304):

> It is also of some significance that the degree of proof required to show willful failure to file a return, the misdemeanor involved here, is not so demanding as if this were a prosecution for willful tax evasion, a felony.

This was a correct statement of the law. To establish the felony of wilful attempted tax evasion, "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statu-

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[2] The only other decision relied upon by petitioner, *United States* v. *Palermo*, 259 F. 2d 872 (C.A. 3), a non-jury case where the trier of the facts had used patently improper standards in evaluating wilfulness, involved a prosecution for failure to pay income tax, rather than failure to file a return. The difference is crucial. "Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree." *Spies* v. *United States*, 317 U.S. 492, 497-498.

tory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." *Spies* v. *United States*, 317 U.S. 492, 499. All the court meant by the quoted portion of the charge was what it spelled out elsewhere in the instruction—namely, that it was not incumbent on the government in this case to prove deceit, falsification, or attempt to evade a tax (cf. A-299). In addition, any error in this instruction was harmless in view of "the additional very comprehensive instructions on burden of proof" (Pet. 14). Furthermore, if petitioner's counsel deemed this portion of the charge prejudicial, he "should have stated the grounds for his objection as required by Rule 30" (Pet. 14) rather than have made merely a general objection.

The trial was fair and the evidence of guilt clear. The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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